SUPREME COURT, U.S.

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 705

FRANK RIGGALL,
Petitioner,

vs.

WASHINGTON COUNTY MEDICAL SOCIETY; STANLEY APPLEGATE, Individually and As President of Washington County Medical Society; FOUNT RICHARDSON; FRIEDMAN SISCO; RUTH ELLIS LESH; and ALFRED HATHCOCK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on November 15, 1957.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix B, *infra*) is not yet reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 15, 1957. By an order of that Court entered on December 5, 1957, the issuance of a mandate was stayed for a period of thirty (30) days from that date, pending application to this Court for a writ of certiorari (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED.

I.

Whether the practice of medicine is "trade" within the terms of the Sherman Anti-Trust Act, 15 U. S. C., Sections 1 and 2 (Appendix A, *infra*).

II.

Whether the complaint in this case stated a claim for relief under the provisions of the Sherman Anti-Trust Act, 15 U. S. C., Sections 1, 2, 12, and 15.

STATUTES INVOLVED.

The statutory provisions involved are the Sherman Anti-Trust Act, 15 U. S. C., Sections 1, 2, and 15 (Appendix A, *infra*).

STATEMENT.

On November 30, 1956, the petitioner, Frank Riggall, filed a complaint against the respondents in the United States District Court for the Western District of Arkansas, Fayetteville Division, alleging that he was a citizen of Arkansas, residing within that district and division, and that the individual respondents were citizens of the State of Arkansas, and that jurisdiction of the court was based upon the provisions of the Sherman Anti-Trust Act, Title 15, U. S. C., Sections 1, 2, 12, and 15. The complaint alleged that the petitioner was a duly and regularly licensed physician and surgeon engaged in the practice of medicine and surgery with his principal place of business at Prairie Grove, Arkansas. It also alleged that he had graduated and received the degrees of Bachelor of Arts and Master of Arts from the University of Arkansas, and that he was a graduate of a Grade "A" medical school, *i. e.*, The University of Western Ontario, from which he had received the degree of Doctor of Medicine in 1934. The complaint further alleged that the petitioner had done and received a great amount of post-graduate training in medicine; that he was a member of the Royal College of Surgeons of England, and Licentiate of the Royal College of Physicians of London, a Specialist in Medicine of the Royal College of Physicians of Edinburgh, a Fellow of the Royal College of Physicians of Edinburgh and Specialist in Surgery of the Fellowship of the Royal College of Surgeons of Edinburgh, and a Fellow Qua Surgeon of the Royal Faculty of Physicians and Surgeons of Glasgow. The complaint further alleged that the petitioner was the holder of a medical license issued by the Medical Licensing Board of the State of Arkansas in 1935.

The petitioner further alleged that ever since the issuance of his medical license in 1935, he had been engaged in the practice of medicine and surgery in Washington County, Arkansas, and that he received, accepted, treated, and administered to patients from Arkansas, Oklahoma, Kansas, Missouri, Texas, and other states, and that by virtue of his consultant's rank, his training in medicine and surgery, and the great amount of postgraduate training in medicine and surgery which he had had and received, he would in the past have received, accepted, treated, and administered to a great many more patients and would in the future receive, accept, treat, and administer to a great many more patients than in the past have come to or were referred to him, not only from the State of Arkansas, but also from many other states, were he a member of the Washington County Medical Society and but for the unlawful conspiracy against him by the respondents mentioned and described in the complaint. The complaint further alleged that the petitioner was and had been for many years a member in good standing of the British Medical Association and The Canadian Medical Association, that he was a Fellow of the Royal Society of Medicine of London, and that he was and had been at all times mentioned in the complaint qualified for membership in Washington County Medical Society.

It was further alleged in the complaint that the petitioner had applied four (4) times for membership in the Washington County Medical Society, each time upon forms prescribed by and in the manner prescribed by the constitution and by-laws of the Washington County Medical Society, his first application having been submitted in 1935, another in 1947, and another in 1954. It was further alleged that all of those applications were wrongfully, unlawfully, capriciously, and arbitrarily rejected and denied,

and that the petitioner was never given any reason for the rejection and denial thereof. The complaint further alleged that the petitioner had appealed in the proper manner and within apt time to the Arkansas Medical Society, then to the American Medical Association, and that the latter association had on March 23, 1956, declined to take jurisdiction of his appeal, with the result that the determination of the Washington County Medical Society became final as far as organized medicine was concerned.

The complaint further alleged that on September 27, 1956, petitioner again applied for membership in the Washington County Medical Society in the proper manner; that that application was referred to a credentials committee which committee reported to the society that the credentials of the petitioner were in order and not subject to question; but that notwithstanding such determination of the credentials committee, his application was rejected and denied on November 6, 1956, and that the petitioner had never been given any reason by the respondents for the rejection and denial thereof. The complaint further alleged that at the time the appeal of the petitioner was prosecuted to the Arkansas Medical Society the respondent Fount Richardson was President of the Arkansas Medical Society and that further appeal within the channels of organized medicine would be a useless formality, wholly futile and unavailing, and a waste of time and effort, because of the fact that the respondent Fount Richardson and the other respondents herein would cause the Arkansas Medical Society to affirm and rubber-stamp the action of the Washington County Medical Society.

It was further alleged in the complaint that the constitution and by-laws of the Washington County Medical Society provided that "Every legally registered physician residing and practicing in Washington County who is of

good moral and professional standing and who does not support or practice or claim to practice, any exclusive system of medicine, shall be eligible for membership," also that "The Society shall judge of the qualifications of its members, but as it is the only door to the state medical society and the American Medical Association, for physicians within its jurisdiction, every reputable and legally qualified physician of Washington County who does not support, or practice or claim to practice sectarian medicine, or who does not claim to have exclusive or special medicines not available to the general profession, and who adheres carefully to the principles of medical ethics, shall be eligible to membership." It was further alleged in the complaint that the constitution and by-laws of Washington County Medical Society provided that "This Society shall have general direction of the affairs of the medical profession of the county, and its influence shall be constantly exerted to better the scientific, material and social condition of every physician within its jurisdiction. Systematic efforts shall be made by each member, and by the Society as a whole, to increase the membership until it embraces every reputable physician in the county."

It was further alleged in the complaint that Washington County Medical Society was a component member of the Arkansas Medical Society and held a charter, from that society, and that the constitution and by-laws of Arkansas Medical Society, provided that that Society should "especially and systematically endeavor to promote friendly intercourse among physicians of the same locality, and shall continue these efforts until every physician in every county of the state who is reputable and eligible has been brought under medical society influence."

It was further alleged in the complaint that the Arkansas Medical Society was a constituent member of the Ameri-

can Medical Association, that American Medical Association is the only medical society or association of nation-wide prominence, importance or influence in the United States, and that

> "Membership in it is of great economic benefit to a physician or surgeon and enables him to render far better service to his patients and to the public than he could possibly render without membership therein. No physician or surgeon can become a member of American Medical Association, or participate in any of its activities, or receive any of its services and the economic benefits deriving and flowing therefrom, unless he is a member of the medical society within and for the county within which he resides and practices, and unless he also is a member of the state medical society of the state in which he resides and practices. Membership in the American Medical Association is of great economic as well as social benefit to a physician and surgeon, and membership in that organization would in the past have been and in the future would be of great economic and social benefit to the plaintiff. The American Medical Association maintains extensive offices. It periodically issues and publishes a directory of physicians and surgeons in the United States of America and the Dominion of Canada, listing the members and non-members of the American Medical Association, in different type, so as to distinguish to the medical profession in general, as well as to the public, those physicians and surgeons who are its members from those who are not. Said medical directory plainly designates and denotes those physicians and surgeons who are qualified as specialists in their respective fields of medicine, but no doctor who is not a member of the American Medical Association, although qualified as a specialist, is listed in said directory as a specialist. Said American Medical Association annually and other times during the year holds conventions as well as education and instructive professional meetings which can be attended and participated in only by its members. The

listing in said medical directory and the attendance and participation in the educational and instructional meetings held and fostered by the American Medical Association are of great economic benefit to physicians, and would have been in the past and would be in the future of great economic benefit to the plaintiff, had he been or were he permitted to enjoy them."

The complaint further alleged that solely because the petitioner had been denied membership in the Washington County Medical Society he had been and was prevented from and could not do a number of enumerated things all of which would be of great economic benefit and importance to him as well as to his patients and to the public and society in general, and all of which substantially affect trade and commerce between the State of Arkansas and other states, territories, and foreign countries.

The complaint further alleged that membership in the Washington County Medical Society had come to be and was recognized as a certification of the repute and good standing of a physician and surgeon among his fellows and that it had become a prerequisite to various opportunities, privileges, and perquisites once freely open to all members of the medical profession, that the respondents had taken it upon themselves to exclude the petitioner from the opportunities, privileges, and perquisites which the members of the Washington County Medical Society freely enjoyed, and that the respondents had sought to substitute for the medical license of petitioner an inferior and non-privileged license to practice medicine.

The complaint alleged that the respondents had combined, confederated, and conspired among themselves and with other persons, in utter disregard of the provisions of the constitution and by-laws of the Washington County Medical Society, not to admit the petitioner to membership

in said society, in direct violation of the provisions of said constitution and by-laws, and that the respondents had stated publicly that they were not required to give the petitioner any reason whatever for refusing or denying him membership.

The complaint detailed twenty-one (21) overt acts which had been committed by the respondents in the perpetration and furtherance of said conspiracy, all of which were in violation of the Sherman Anti-Trust Act, Title 15, U. S. C., Sections 1, 2, 12, and 15, and that said acts and things done and committed by the respondents constituted a direct and substantial burden upon and hindrance and restraint of trade and commerce, in violation of said Act.

The petitioner prayed judgment against respondents in the amount of One Hundred Thousand Dollars ($100,000.00) and for treble damages as provided in the Sherman Anti-Trust Act; for an injunction to prevent the appellees from again conspiring against him in the manner alleged in the complaint; and for a mandatory injunction thereby commanding the respondents to admit him to full membership in the Washington County Medical Society.

On December 28, 1956, the respondents filed an answer admitting various allegations of the complaint, denying others, and denying that the United States District Court had jurisdiction of the claim alleged in the complaint. On February 23, 1957, the petitioner filed a Motion for Production of Documents and a Request for Admission of Facts, asking that respondents be required to produce and to permit him to inspect and copy all of the books, minutes, records, and other papers, pertaining to all of his applications for membership and the action of Washington County Medical Society thereon, and requesting that the respondents admit that they had no reason what-

ever for the rejection and denial of his application on November 6, 1956, other than that it was their understanding that the Washington County Medical Society could reject and deny and had the right to reject and deny an application for membership in said society at will and without any reason for its said action.

On February 27, 1957, the respondents filed Objection to Request for Admission of Facts and Objection to Motion for Production of Documents, in which they stated that said motion and request were premature and improper until such time as the United States District Court had ruled upon the question of its jurisdiction.

On March 28, 1957, the United States District Court entered an Order dismissing the complaint for lack of jurisdiction.

An appeal to the United States Court of Appeals for the Eighth Circuit was duly prosecuted, and on November 15, 1957, that court entered judgment affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Is in Conflict with the Decision of the United States Court of Appeals for the District of Columbia in American Medical Association v. United States, 130 F. 2d 233.

The effect of the decision below is to hold that the practice of medicine as outlined in the complaint in this case does not constitute trade or commerce within the meaning of the Sherman Anti-Trust Act. Such holding is in direct conflict with the decision in the *American Medical Association* Case, *supra*, in which the Court said:

"In United States v. American Medical Association (110 F. 2d 703), we held that the term 'in restraint of trade' as used in Section 3 of the Sherman Act, 15 U. S. C., Sec. 3, had its genesis in the common law; that the practice of medicine was recognized by the English cases as constituting trade; that a restraint imposed upon the practice of medicine may constitute a restraint of trade; * * *"

"As we indicated in our earlier opinion the common law recognized the practice of medicine as being a trade and there is nothing in the Apex case to suggest the contrary. It may be regrettable that Congress chose to take over the common law concept of trade, at least to the extent of including therein the practice of medicine."

That decision was affirmed by this Court (317 U. S. 519), but this Court found it unnecessary to decide whether the practice of medicine was trade within the meaning of the Sherman Act because Section 3 of the Act, under which the case arose, applies to the District of Columbia over which Congress has the power to legislate without resort to the commerce clause of the Constitution.

In *United States* v. *Oregon State Medical Society*, 343 U. S. 326, this Court again found it unnecessary to decide whether the practice of medicine was trade, the decision there being based on the fact that the Government had failed to prove the charges.

As this Court has never decided the point as to whether the practice of medicine constitutes trade within the meaning of the Sherman Act, it should resolve the question.

II.

The Decision Below Is in Conflict with the Rules Expressed by This Court in the Following Cases: Radovich v. National Football League, 352 U. S. 445; United States v. National Association of Real Estate Boards, 339 U. S. 485; and Times-Picayune Publishing Company v. United States, 345 U. S. 694.

In its decision below the United States Court of Appeals said that a private party may not recover under the Sherman Anti-Trust Act unless there has been an injury to the general public economically. That holding, it is submitted, is in direct conflict with the rule expressed by this Court in *Radovich*, *supra*, where it was said:

> "Petitioner's claim need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. Times-Picayune Publishing Co. v. United States, 1953, 345 U. S. 594, 614, 73 S. Ct. 872, 833, 97 L. Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the anti-trust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. * * * In the face of such policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The decision below is also in direct conflict with the principles expressed by this Court in *United States* v. *National Association of Real Estate Boards*, *supra*, where this Court observed that the District Court had held in the *American Medical Association* Case, *supra*, that the practice of medicine was a trade within the meaning of the Sherman Act and went on to say "We do not intimate

an opinion on the correctness of the application of the term to the professions," and that "The fact that no goods are manufactured or bought or sold in the process is as irrelevant here as it was in *Atlantic Cleaners & Dyers* v. *United States, supra.*"

That the decision below is in direct conflict with the rule expressed by this Court in *Times-Picayune Publishing Company* v. *United States, supra*, is demonstrated by the following language from the opinion in that case: "The 'market', as most concepts in the law of economics, cannot be measured by metes and bounds. Nor does the substance of Sherman Act violations typically depend on so flexible a guide."

In his complaint in this case the petitioner detailed at least twenty-one (21) separate, distinct overt acts committed by the respondents, all of which substantially interfered with, burdened, and restrained trade and commerce between the State of Arkansas and other states, territories, and foreign countries. The complaint enumerated and described the many, extensive, and far-flung activities of the American Medical Association, in which petitioner seeks membership. Those activities extend to and affect commerce and trade between all of the forty-eight states and numerous foreign countries, as was set out in the complaint. In this case the effect of the decision of the court below was to say that the respondents can arbitrarily and without any just reason whatever exclude any qualified physician and surgeon from membership in the American Medical Association and from participating in its many and varied activities merely by denying him membership in his county medical society. If the respondents can exclude one physician and surgeon from membership in that manner and thereby deny him all of the benefits flowing or calculated to flow from American Medical As-

sociation membership, they can do likewise to all physicians and surgeons who may apply. That such a condition would constitute a violation of the Sherman Act should require no argument.

There is no language in *Radovich, supra*, from which any idea may be gleaned that any actual harm to the public could or actually would result from the black-listing of football player Radovich, this Court being content with the statement that Congress has said in the Act itself that a violation of its provisions was injurious to the public. The same rule applies, with even greater force, to this case, where the petitioner has alleged in detail the unlawful acts committed by the respondents and the manner in which those acts have affected trade and commerce.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should issue.

Respectfully submitted,

JAMES R. HALE,
Ozark Theatre Building,
Fayetteville, Arkansas,
Attorney for Petitioner.

APPENDIX A.

Sections 1, 2 and 15 of the Sherman Anti-Trust Act, insofar as pertinent here, read as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *." (15 U. S. C. 1).

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (15 U. S. C. 2).

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U. S. C. 15).

APPENDIX B.

Opinion Below.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,804.

Frank Riggall, Appellant,

vs.

Washington County Medical Society; Stanley Applegate, Individually and as President of Washington County Medical Society; Fount Richardson; Friedman Sisco; Ruth Ellis Lesh; and Alfred Hathcock, Appellees.

} Appeal from the United States District Court for the Western District of Arkansas.

[November 15, 1957.]

James R. Hale for Appellant.

Eugene R. Warren (Rex W. Perkins and Bailey, Warren & Bullion on the brief) for Appellees.

Before GARDNER, Chief Judge, and VOGEL and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Chief Judge.

Appellant, a duly licensed physician and surgeon, brought this action against the defendants to recover treble damages for alleged violations of the Sherman Anti-Trust Act, Title 15, U. S . C., Secs. 1, 2, 12 and 15. We shall refer to the parties as they were designated in the trial court.

Plaintiff was duly licensed as a physician and surgeon by the licensing authorities of the State of Arkansas in 1935 and at and since said time has been practicing his profession in Washington County, Arkansas. The defendant Washington County Medical Society is an unincorporated professional, economic organization and institution with at least thirty-six dues-paying or active members, and the other named defendants are members of the Washington County Medical Society and are also physicians and surgeons. Plaintiff in his complaint alleged that he was a citizen of Arkansas and that the defendants were also citizens of the State of Arkansas; that jurisdiction of the court was dependent upon provisions of the Sherman Anti-Trust Act, Title 15, U. S. C., Secs. 1, 2, 12 and 15; that he had received various degrees from educational institutions and had thorough training and wide experience in the field of medicine and its practice; that while he was located at Prairie Grove, Arkansas, where he had practiced his profession since 1935, he received, accepted, treated and administered to patients from Arkansas, Oklahoma, Kansas, Missouri, Texas and other states and that had he been a member of the Washington County Medical Society he

would in the past have received, accepted, treated and administered to a great many more patients and would in the future receive, accept, treat and administer to a great many more patients than in the past, not only from Arkansas but from many other states; that he was qualified for membership in the society but that notwithstanding such qualifications he had applied for membership in due form on four different occasions; that his applications had been wrongfully, unlawfully, capriciously and arbitrarily rejected, no reason for such rejections being given therefor; that he had exhausted his administrative remedies by appeal to the Arkansas Medical Society and the American Medical Association but was unable to secure any redress and would in the future be unable to secure any remedy for the injuries suffered by reason of the arbitrary rejection of his applications for membership in the Washington County Medical Society, that the Constitution and By-Laws of the Washington County Medical Society provided that "Every legally registered physician residing and practicing in Washington County who is of good moral and professional standing and who does not support or practice, or claim to practice, any exclusive system of medicine, shall be eligible for membership," and "The Society shall judge of the qualifications of its members, but as it is the only door to the state medical society and the American Medical Association, for physicians within its jurisdiction, every reputable and legally qualified physician of Washington County who does not support, or practice or claim to practice sectarian medicine, or who does not claim to have exclusive or special medicines not available to the general profession, and who adheres carefully to the principles of medicial ethics, shall be eligible to membership," and "This Society shall have general direction of the affairs of the medical profession of the county, and its influence shall be constantly exerted to better the scientific,

material and social condition of every physician within its jurisdiction. Systematic efforts shall be made by each member, and by the Society as a whole, to increase the membership until it embraces every reputable physician in the county;" that the Washington County Medical Society was a conponent member of the Arkansas Medical Society and held a charter from that society, that the Arkansas Medical Society was a constituent member of the American Medical Association; that the American Medical Association is the only medical association or society of national prominence, influence or importance in the United States and that membership in the American Medical Association is of great economic importance and benefit; that because of his denial of membership in the Washington County Medical Society he had been and was prevented from doing a number of enumerated things all of which would be of great economic benefit and importance to him as well as to his patients and the public and society in general, all of which substantially affected trade and commerce between the State of Arkansas and other states, territories and foreign countries, and that the defendants had combined, confederated, and conspired among themselves and with other persons in disregard of the provisions of the constitution and by-laws of the Washington County Medical Society not to admit plaintiff to membership in said society and that defendants had stated publicly that they were not required to give plaintiff any reason for refusing or denying him membership. In his prayer he asked for $100,000 damages, that this amount be trebled pursuant to provisions of the Sherman Anti-Trust Act, that the defendants be enjoined and restrained from collusive or concerted action in respect to his application for membership, and that mandatory injunction issue commanding the defendant Washington County Medical Society to admit him

to full membership. Other specific relief was also demanded.

Defendants filed answer denying that the court had jurisdiction of the cause of action or that the Sherman Anti-Trust Act was applicable to the allegations of plaintiff's complaint.

On hearing the court determined that it was without jurisdiction and entered judgment dismissing the complaint.

On this appeal it is urged that the court erred in holding that it was without jurisdiction and that is the sole issue.

Sections 1 and 2 of the Sherman Anti-Trust Act, so far as here pertinent, read as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * (Sec. 1, Title 15, U. S. C.)

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (Sec. 2, Title 15, U. S. C.)

Section 3 of the Sherman Anti-Trust Act is confined in its operation to territories or the District of Columbia and has no bearing on the issues here presented.

We must accept as true all well-pleaded facts in the complaint, but not conclusions. Section 1 of the Sherman Act was enacted by Congress pursuant to the commerce clause of the Constitution vesting in Congress the power to regulate interstate commerce. It is to be noted that the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians. There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce. The mere fact that plaintiff at his location in Arkansas may be treating patients from other states who must travel interstate does not result in practicing his profession in interstate commerce as the transportation of such patients is incidental. The practice of his profession as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act, nor are there any allegations in the complaint indicating that the actions of defendants here complained of resulted in a monopoly within the provisions of Section 2 of the Act. Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *Spears Free Clinic and Hospital* v. *Cleere*, 10 Cir., 197 F. 2d 125; *United States* v. *Oregon State Medical Society*,

Ore., 95 F. Supp. 103; *United States* v. *Oregon Med. Soc.*, 343 U. S. 326; *Northern California M. D. Ass'n* v. *Interment Ass'n*, S. D. Cal., 120 F. Supp. 93; *Kolb* v. *Pacific Maritime Association*, N. D. Cal., 41 F. Supp. 264. In *Apex Hosiery Co.* v. *Leader*, *supra*, the Supreme Court has pointed out the scope and purpose of the Sherman Anti-Trust Act. In the course of the opinion in that case the court in referring to the purpose of the enactment of the Sherman Anti-Trust Act said:

> "It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the goods and services, all of which had come to be regarded as a special form of public injury."

Again, it is said:

> "In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or other-

wise to deprive purchasers or consumers of the advantages which they derive from free competition."

In *United States* v. *Oregon State Medical Society, supra*, the United States brought suit against the Oregon State Medical Society and others to restrain alleged violation by defendants of the Sherman Anti-Trust Act. The court in holding that the defendants were not guilty of any of the charges against them, among other things, said:

> "The practice of medicine as conducted within the State of Oregon by doctors of Oregon, including defendants, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law, 15 U. S. C. A., Sec. 1, nor is it commerce within the meaning of the constitutional grant of power to Congress 'to regulate Commerce * * * among the several States'."

On direct appeal to the Supreme Court this decision was affirmed and the Supreme Court in the course of its decision, in referring to the finding that the practice of medicine was not trade or commerce within the meaning of Section 1 of the Sherman Act, said:

> "If that finding in both aspects is not to be overturned as clearly erroneous, it, of course, disposes of this charge * * *."

The decision of the Supreme Court is of significance in another aspect. Plaintiff here relies quite strongly on *American Medical Association* v. *United States*, 317 U. S. 519. The decision of the Supreme Court in *United States* v. *Oregon State Medical Society, supra*, points out that that decision is clearly distinguishable because it arose under Section 3 of the Sherman Act. Referring to this question the court said:

> "*American Medical Assn.* v. *United States*, 317 U. S. 519, does not stand for the proposition that fur-

nishing of prepaid medical care on a local plane is interstate commerce. That was a prosecution under Section 3 of the Sherman Act of a conspiracy to restrain trade or commerce in the District of Columbia. Interstate commerce was not necessary to the operation of the statute there."

In *Spears Free Clinic and Hospital v. Cleere, supra,* action was brought against the Medical Society of Denver City and County, former and present members of the State Board of Health and former and present officials and trustees of the Medical Society based on alleged violations of Sections 1 and 2 of the Sherman Anti-Trust Act. There it was alleged that "numerous persons from all of the United States and from many foreign countries" regularly came to the plaintiff institution for treatment. The complaint further alleged that the defendants combined and conspired to prevent the licensing of the institution and to prevent the operation and maintenance of the institution and to further allocate to various members of the medical profession within the State the entire practice of the healing arts to the exclusion and restraint of the practice of chiropractic. There were further allegations that the defendants did certain acts to prevent the maintenance of the hospital as a chiropractic institution and to monopolize the entire practice of the healing arts within the State of Colorado in the medical profession. Referring to these charges the court among other things said:

"The practice of the heating arts in Colorado, including chiropractic, is wholly local in character. The alleged conspiracy and the acts alleged to have been done in furtherance thereof had for their purpose and object the monopolization and restraint of purely local activities. No price fixing or price maintenance for professional or other services was involved. There was no intent to injure, obstruct or restrain inter-

state or foreign commerce. The mere fact that a fortuitous and incidental effect of such conspiracy and acts may be to reduce the number of persons who will come from other states and countries to the Spears Hospital for chiropractic treatments does not create such a relation between interstate and foreign commerce and such local activities as to make them a part of such commerce.

"To come within the purview of the Sherman Act the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote."

As has been observed, plaintiff's complaint in substance is that the practice of his profession would have been more profitable to him had the defendants not deprived him of membership in the Washington County Medical Society. Plaintiff was not prevented from practicing his profession and the complaint, we think, is wholly lacking in allegations essential to a cause of action under the Sherman Anti-Trust Act.

The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

(Order Staying Issuance of Mandate.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15804.

September Term, 1957.

Thursday, December 5, 1957.

Frank Riggall, Appellant,

vs.

Washington County Medical Society et al.

Appeal from the United States District Court for the Western District of Arkansas.

On Consideration of the motion of the appellant for a stay of mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

December 5, 1957.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 705

FRANK RIGGALL, *Petitioner*

v.

WASHINGTON COUNTY MEDICAL SOCIETY; STANLEY APPLEGATE, Individually and as President of Washington County Medical Society; FOUNT RICHARDSON; FRIEDMAN SISCO; RUTH ELIAS LESH; and ALFRED HATHCOCK, *Respondents*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARAGON PRINTING CO., LITTLE ROCK

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OPINION BELOW

The opinion of the United States Court of Appeals for the 8th Circuit, is not yet officially reported, but is found in the appendix to the petition.

JURISDICTION

The Petitioner seeks to review the action of the United States Court of Appeals for the 8th Circuit, in affirming a decree of the United States District Court for the Western District of Arkansas, dismissing Petitioner's Complaint.

QUESTIONS PRESENTED

I

Whether the decision of the United States Court of Appeals is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *American Medical Association* v. *United States*, 130 F. 2nd 233.

II

Whether the decision of the United States Court of Appeals in this case is in conflict with prior decisions of this Honorable Court.

STATUTES INVOLVED

The statutory provisions involved are the Sherman Anti-Trust Act, 15 U.S.C., Sections 1, 2, 12 and 15.

STATEMENT

Dr. Frank Riggall is a practicing physician residing in the town of Prairie Grove, Arkansas; a town of 939 inhabitants, located in Washington County, Arkansas. He has resided and has practiced medicine in Prairie Grove since 1923; under a regular license since 1935. On September 27, 1956, he applied to the Washington County Medical Society for membership in that society. His application was received and submitted to the membership of the society in accordance with its Constitution and By-Laws which provide that the society shall be the judge of the qualifications of its members. His application for membership was rejected by secret ballot by a vote of 34 against and two for admission. This application was the fourth made by appellant, he having applied in 1935, and in 1947, and in 1954, all three times being rejected by the society. In an effort to compel his acceptance into membership in the county society, appellant instituted

action against the Washington County Medical Society and five of its members, alleging a violation on their part of Sections 1 and 2 of the Sherman Anti-Trust Act. The complaint was rather prolix, but stripped of its verbiage, it was essentially a complaint based upon allegations of loss of economic benefit and prestige to the appellant individually because he had not been accepted by the membership of the county society. As a basis for Federal Court jurisdiction, appellant alleged that he treats and administers to patients from other states and further if granted membership in the Washington County Medical Society, he would ultimately receive membership in the American Medical Association; that because of his superior ability and "international recognition", he would achieve wide-spread notoriety and as a result a great many persons from other sections in the United States would come to him for medical treatment and services. He further alleged that because of his superior talents in the various fields of medicine, he would be consulted by physicians from other States who would refer their patients to him for treatment and medical services. This, appellant contends, brings the case under the Sherman Anti-Trust Act. In short, appellant's position as set out in his complaint, was that denial to him of membership in the local county society constitutes a burden on interstate commerce between the State of Arkansas and other states.

Appellant listed in his complaint a great number of personal honors which he says should properly be his due to his unusual talents. The principal legal claim of Federal jurisdiction, however, was based upon his assertion that his skill and talents cannot be properly appreciated nor publicly known and brought to the attention of both physician and laity (which would immediately bring to him economic benefit and personal prestige)

unless he can say that he is a member of the local medical society.

Appellees plead to the jurisdiction of the District Court, their contentions being briefly these:

1. That appellant is simply a local physician, notwithstanding extravagant claims, practicing in Prairie Grove, Arkansas, and that the fact that he may have treated patients who live or have lived in other states does not constitute his practicing medicine in interstate commerce as that term is used and intended in Section 1 of the Sherman Act.

2. That the practice of medicine in Prairie Grove, Arkansas, is wholly local in character and the practice of medicine being one of the learned professions; it cannot be properly classified as "trade" or "commerce" under Section 1 of the Sherman Act.

3. That Section 1 of the Sherman Act was intended to protect the public from price fixing and price maintenance and that no allegation is made in the complaint that any of the acts of the defendants have resulted in or intended to control prices or fees for profesisonal services in Washington County, Arkansas, or any other place.

4 That the essential purpose of the appellant's complaint as reflected by his prayer, was to compel his admission into membership of the Washington County Medical Society and that the Court has steadfastly refused to assume control of the admissions or rejections to memberships in professional societies or clubs.

The District Court adopted the Contentions of Appellees and dismissed the Complaint.

On appeal to the United States Court of Appeals for the Eighth Circuit that Court, on November 15, 1957, en-

tered judgment affirming the judgment of the District Court.

Point I

There Is No Conflict Between the Decision in This Case and the Decision of the United States Court of Appeals for the District of Columbia in American Medical Association v. United States, 130 F. 2nd 233.

The petitioner asserts as a reason for the granting of a writ of certiorari by this Court that the decision in the present case is in conflict with the decision of the United States Court of Appeals for the District of Columbia, in *American Medical Association* v. *United States*, 130 F. 2nd 233. Such assertion is clearly erroneous. There is no conflict in the two decisions as indicated by the language used by both of the courts. The present case arose under an alleged violation of Section 1 of the Sherman Act and was so considered by the Court below. In its decision, the Court said:

> "Section 3 of the Sherman Anti-Trust Act is confined in its operation to territories or the District of Columbia and has no bearing on the issues here presented."

In the American Medical Association case, the Court was not considering Section 1 and no question of Interstate Commerce was involved. On page 241 of the decision, the Court stated:

> "And, as the prosecution in the present case is under Section 3 of the Act no question of the interstate character of that trade or commerce is involved."

In the present case, one of the principal grounds for the holding of the Court below was that there was no allegation in the complaint to sustain an argument that any

of the acts of the defendants cast any burden on interstate commerce. In its decision, the Court said:

> "It is to be noted that the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians. There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce."

And, further, in the decision the Court pointed out:

> "The practice of his profession as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act, nor are there any allegations in the complaint indicating that the actions of defendants here complained of resulted in a monopoly within the provisions of Section 2 of the Act."

Further, the American Medical Association case was based upon a conspiracy, the purpose of which was to restrain competition, raise prices or otherwise control the market. On page 238 of the decision, the Court stated:

> "So far as Group Health and the Hospitals are concerned, therefore, their activities are properly described as business and commercial in character. There is also no question that commercial and business competition was not only the possible but the probable result of Group Health's activities. Consequently—entirely apart from any direct restraint upon the practice of medicine itself—if a conspiracy was shown, the purpose of which was to restrain competition, raise prices, or otherwise control the market to the detriment of purchasers or consumers of medical or hospital services, by de-

> stroying or injuring Group Health Association, it was sufficient to sustain the conviction."

In the present case, the Court below specifically found that there was no economic injury to the general public alleged, but that this was purely a case involving a private party's desire for greater profits in his practice. The Court said:

> "Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically."

This Honorable Court has recognized the difference between the application of Section 3 of the Sherman Act and Section 1 of that Act. Its language in the following cases clearly points out the distinction between the application of the two sections and makes it quite evident and apparent that there is no conflict between the decisions here under consideration:

American Medical Association v. *United States*,
317 U.S. 519, 87 L. Ed. 434;

United States v. *Oregon Medical Society*,
343 U.S. 326, 96 L. Ed. 978; and

United States v. *National Association of Real Estate Boards*,
339 U.S. 485, 94 L. Ed. 1007.

Point II

There Is No Conflict Between the Decision in This Case and the Decisions of This Honorable Court

The Petitioner argues that the decision of the Court below, that a private party may not recover under Section 1 of the Sherman Act unless there has been an injury to the general public economically, is contrary to the decisions of this Court in *Radovich* v. *National Football League*, 352 U.S. 445, 1 L. Ed. 456; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 94 L. Ed. 1007; and *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 694, 97 L. Ed. 1277. The Petitioner argues that the Radovich decision changed the rule announced in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 84 L. Ed. 1311, and that under the Radovich decision it is not necessary that the prohibited activities tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. The rationale of his argument is that the Sherman Act irrespective of the amount of interstate commerce affected, now is applicable to instances of private injury without regard to the economic effect upon the general public. Radovich simply did not so hold.

Radovich involved an allegation of conspiracy to monopolize and control organized football, a multi-state industry. The allegations were that the purpose of the conspiracy was to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States". Involved also was the transmission of games over radio and television "into nearly every State of the Union". The playing of the exhibitions themselves "is essential to the interstate transmission by broadcasting and television and the actions of

the respondents against Radovich were necesarily related to these interstate activities".

The case involved complete market control of the football business on a mass interstate level.

There was no language contained in the decision on which to base an argument that the requirements of (1) substantial interstate activity; and (2) market control to the injury of the public, were eliminated from the application of Section 1 of the Sherman Act. The case did hold that where there was a volume of interstate business which resulted in market control to the injury of the general public, a member of that general public adversely affected could seek legal relief. It did not remotely suggest that relief under Section 1 of the Sherman Act was available in instances of private injury by activities directed at one particular individual in an intrastate activity and in which the public suffered no injury and was not concerned economically.

Furthemore, in its opinion, this Court cited the Apex Hoisery case with approval and cited as authority for its holding the specific language which petitioner now asserts has been abrogated by the Radovich decision. In footnote 10 in the opinion, the Court says:

> "10. In *Apex Hosiery Co.* v. *Leader*, 310 US 469, 84 L. Ed. 1311, 60 S. Ct. 982, 128 ALR 1044 (1940), this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.'"

National Association Real Estate Boards, supra, is likewise cited by Petitioner as authority for his contention. That case was essentially a price fixing case involving complete market control of the real estate business in the District of Columbia. It arose under Section 3 of the Sherman Act. Mr. Justice Douglas in the opinion states:

> "The core of the case is the charge that the members of the Washington Real Estate Board combined and conspired to fix the Commission rates for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia."

He also cites the *Apex Hosiery Co.* case as containing the correct statement of the purposes of the Sherman Act, saying:

> "The Act was aimed at combinations organized and directed at control of the market by suppression of competition in the marketing of goods and services."

Times-Picayune Pulishing Company v. *U. S., supra,* also cited by Petitioner, involved an allegedly illegal trying arrangement in an effort to control the prices of advertising to the detriment of the general public. Relief was denied because the company did not occupy a dominant position in the newspaper advertising market in New Orleans. The Court found no "unreasonable restraint on interstate commerce" and consequently Section 1 of the Sherman Act had no application.

CONCLUSION

The Petitioner has presented no case of conflict between the decisions of the Circuit Courts of Appeals. He has alleged no injury to the public nor has he shown any burden or restraint upon interstate commerce. He simply presents a question of whether the Federal Courts under the Sherman Act will review the action of the members of a local medical society in voting not to admit a local physician into membership. His complaint reflects that his right to practice medicine remains untouched. Indeed from the allegations of his complaint and his statement, his practice is and has flourished without membership in the local society. He makes no allegation of price control nor does he allege that the public is affected by the acts herein complained of.

It is respectfully submited that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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